

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 26.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Appeal Suit No.195 of 1993

R.Subbu

... Appellant

Vs.

B.S.Kolandaisamy

... Respondent

PRAYER: First Appeal against the Judgment and decree dated 25.01.1993 and made in O.S.No.134 of 1988 on the file of I Additional Sub Court, Erode.

For Appellant : Mr.S.V.Jayaraman S.C.for
M/s. R.Gunasekaran
V.G.Sureshkumar

For Respondent : Mr.T.V.Ramanujam S.C.for
M/s. V.Pichaiya
R.Vidya

J U D G M E N T

The defendant in O.S.No.134 of 1988 on the file of the First Additional Court, Erode is the appellant in this First Appeal. The plaintiff filed the suit for specific performance of the agreement of sale, dated 28.02.1986.

2. The suit was filed on the basis that the defendant who is the owner of the suit property which includes house and shop premises comprised in Door No.10/40 and present Nos.289A and 259 and subsequent new as Nos.288 and 289 ward No.8 situated in Bavani, Mettur Road, has agreed to sell the property to the plaintiff for a sale consideration of Rs.2,00,000/- and executed an agreement of sale 28.02.1986. He has received Rs.1,50,000/- from the plaintiff towards the part sale consideration agreeing to receive the balance consideration of Rs.50,000/- on or before three years from the date of agreement and execute a sale deed. According to the plaintiff ever since the date of agreement he has been ready and willing to pay the balance sale consideration, but the defendant was evading. The plaintiff has issued a legal notice on 08.10.1987 calling upon the defendant to execute the sale deed after receiving the sale consideration and the said notice was received by the

defendant on 12.10.1987 and the defendant has chosen to make false allegation in the reply notice dated 15.10.1987. Hence, the suit filed for specific performance of the agreement of sale dated 28.02.1986.

3. The defence raised by the defendant was that in January 1986 he approached the plaintiff for a loan of Rs.1,50,000/-. The plaintiff has given an amount of Rs.50,000/- initially and obtained a promissory note from the defendant. Thereafter, on 28.02.1986 the plaintiff has advanced another amount of Rs.1,00,000/- and gave a discharge for earlier promissory note for Rs.50,000/- by treating the total amount of Rs.1,50,000/- as a loan. It is also the further case of the defendant that the interest for the said amount of Rs.1,50,000/- at the rate of Rs.1.60 per hundred per month was calculated, which was Rs.2,400/- and the plaintiff has permitted the defendant to repay the amount in 36 installments at the rate of Rs.4,166.75 towards principle and Rs.2,400/- as interest. In fact the said interest was arrived at 36 percent per annum. Not satisfied with the same he has also obtained documents relating to the suit property from the defendant as a further security and it was for that purpose the agreement was obtained. According to the defendant, even though an agreement was obtained by the plaintiff on 28.02.1986 which was not intended for the purpose of sale of the property, it was only a security for the purpose of repayment of loan of Rs.1,50,000/- and the defendant has never intended to sell his property at all.

4. It is also the case of the defendant that in accordance with loan transaction he has paid 10 installments towards the principle as well as interest, even though the plaintiff has passed on receipts only in respect of principle amount in the form of account. It is the case of the defendant that when there were arrears of two installments in respect of repayment as well as loan transaction the plaintiff with the malafide intention, has got back his receipts stating that he would return it after consulting his lawyer, which has not been returned so far. It is the case of the defendant that even in the reply notice dated 15.10.1987 the defendant has only requested time for repayment of the amount in one lump sum. According to the defendant, in respect of the loan amount of Rs.1,50,000/- he has paid so far 65,677.50 to the plaintiff. Therefore, it is the case of the defendant that the agreement is not intended for the purpose of sale of the property and it was only given towards security for the repayment of loan of Rs.1,50,000/-.

5. The learned Trial Judge has framed various issues including, as to whether the plaintiff was entitled for relief of the specific performance, as to whether the plaintiff was always ready and willing to perform his part of obligation and as to whether the defendant has only executed the agreement as a security for repayment of loan. On examination of the plaintiff as a witness on his side and considering Ex.A.1 to A.6 and considering the evidence of three witnesses examined on the side of the defendant including the defendant and on appreciation of Exs.B.1 to B.25,

the Trial Court has decreed the suit on finding that the plaintiff is entitled for the relief of specific performance and Ex.A.1 agreement of sale dated 28.02.1986 stood proved and also holding that Xerox copies of the receipts Exs.B.3 to B.10 are not admissible evidence under Section 65 (a) of the Indian Evidence Act, and also holding that when once the defendant witnesses have admitted that only after knowing the contents of Ex.A.1 it was signed, no oral evidence can be produced against the written agreement marked as Ex.A.1 as per Section 92 of the Indian Evidence Act, it was held that Ex.A.1 was not given as a security for the loan transaction and on that basis the suit was decreed.

6. It was as against the said judgement of the Trial Court, the defendant has filed the present appeal in A.S.No.195 of 1993. Earlier when the appeal was heard a learned Single Judge of this Court after hearing the arguments of both the counsels for appellant as well as the respondent and also appreciating the evidence apart from considering every aspect of the judgement of the Trial Court and having come to the conclusion that Ex.A.1 has been proved to be an agreement of sale, however, holding that even though Section 92 of the Indian Evidence Act is not a bar for the defendant in disproving the real nature of Ex.A.1, has however relied upon Section 92 and held that the defendant has not successfully discharged the burden of disproving Ex.A.1 and in that view of the matter decided that the defendant has not proved that the plaintiff is a money lender and Ex.A.1 was taken as a part of money lending business and therefore, confirmed the judgement of the Trial Court by dismissing the appeal filed by the defendant.

7. Aggrieved by the said judgement in the said appeal dated 07.02.1997 the defendant has filed a Letters Patent Appeal in L.P.A.No.56 of 1997. The Division Bench of this Court while disposing of the said Letters Patent Appeal, by a judgement dated 11.07.2001 allowed the appeal by setting aside the judgement and decree in A.S.No.195 of 1993 passed by this Court dated 07.02.1997 on the basis that pending First Appeal the defendant / appellant has filed an application under Order 41 Rule 27 Code of Civil Procedure in C.M.P.No.515 of 1997 to receive five additional documents to substantiate his contention that the plaintiff in the suit was a financier and even though that C.M.P. was stated to have been dismissed by a separate order by a learned Single Judge, the Division Bench having found,

"when the appellant has filed number of documents it has to be found out whether they are necessary and relevant to decide the controversy between the parties. Once it is found if they are relevant and necessary then necessarily the parties should be given an opportunity to let in evidence for the purpose of marking the documents and opportunity also should be given to the other side for cross examination. This has not been considered by the Appellate Court"

and having come to the conclusion that additional documents filed on behalf of the defendant will have bearing on the case, has remanded the matter back to this Court with a direction to send the additional

documents to the Trial Court and to forward its finding after giving opportunity to the parties to let in evidence relating to additional documents and then decide the First Appeal afresh. The operative portion of the judgement of the Division in L.P.A.No.56 of 1997 is as follows:

"12. For the reasons stated above the Letters Patent Appeal is allowed and the judgement and decree of the Appellate Court are set aside and the matter is remitted back to the Appellate Court for disposal according to law in the light of the observations. The learned Appellate Judge is requested to send the additional documents to the Trial Court and opportunity is also given to both sides to let in evidence relating to the additional documents and finding has to be sent to the Appellate Court in a period of two months. After receiving the finding from the trial court, we request the learned judge to dispose of the appeal as early as possible. Consequently, C.M.Ps. 5696/97, 1273, 1274, 10639, 14260 and 19605 of 2000 and 3974 of 2001 are closed."

8. It is pursuant to the direction given by the Division Bench, the matter was sent to the Trial Court which has given opportunity to both the plaintiff and defendant and marked the additional documents as Exs.B26 to B.31 and permitted the examination of P.W.1 and P.W.2 on the side of the plaintiff and D.W.1 and D.W.5 one Kuruvammal and after appreciation of evidence, sent the report stating that in spite of the filing of the additional documents the defendant has not proved that the plaintiff is either a money lender or financier and the report has been sent. It is to this report, the appellant in this appeal who is the defendant in the suit has filed objections stating that the cumulative effect of Exs.B.26 to B.31 should have been considered in the light of Ex.B.1 to B.11 and B.12 to B.24 already marked before the Trial Court to arrived at a conclusion that Ex.A.1 was given as a security for the loan transaction.

9. Mr.S.V.Jayaraman, learned Senior Counsel appearing for the appellant would submit that the contents of Ex.A.1 stating that in respect of the balance amount of Rs.50,000/- the same shall be paid in a three years period is an unusual stipulation and if Ex.A.1 was really intended for the purpose of sale of property such a long period should not have been given and therefore, it should be presumed that it is only a money transaction. According to the learned Senior Counsel, the plaintiff who relied upon Ex.A.1 has not chosen to explain the reason for three years. Even though it is true that the plaintiff while giving evidence as P.W.1 has stated that the three years period was given to enable the defendant to vacate the premises and hand over possession by shifting his residence to some other place, Ex.A.1 does not state anything about the said fact and therefore, it is only a subsequent development by the plaintiff during examining as a witness, which cannot be permitted. He would further submit that if really the contention of the plaintiff is accepted that three years period is given to enable the defendant to shift the place from the suit property, the three years period which should commence from

28.02.1986, which is the date of Ex.A.1 should be extended upto 27.02.1989, while so what is the necessity for the plaintiff to give the legal notice even before the expiry of three years, namely, on 08.10.1987 itself which is marked as Ex.A.2. Therefore, according to him the three years period is not for the purpose of shifting the place by the defendant but it is to enable the defendant to pay the 36 installments from 28.02.1986 and the purpose of notice Ex.A.2 itself is due to the reason that there was a default committed by the defendant for certain period in respect of repayment of interest and principal and it was due to that reason Ex.A.2 notice was given.

10. He would further submit that the finding of the Trial Court by rejecting the Xerox copies of the receipts for payment of various installments marked as Ex.B.3 to B.10 on the basis that the admissibility of secondary evidence has not been proved is not correct especially in the circumstance that the additional documents marked on remand as Ex.B.26 to B.31 would prove that the plaintiff is in the habit of advancing loan and therefore, it should be taken that the defendant has proved the reason for not producing the originals of Ex.B.3 to B.10, which was explained by the defendant in the written statement as well as the in the evidence that the plaintiff has taken the receipts which are in the form of note book entries promising to return after consulting his lawyer which he has evaded. Therefore, according to the learned Senior Counsel, the explanation offered should have been accepted for the purpose of considering Ex.B.3 to B.10 in the light of Exs.B.26 to B.31.

11. The learned Senior Counsel would also submit that the three years period mentioned under Ex.A.1 which stood not explained, was not considered by the Division Bench while disposing of the L.P.A. since the appeal was disposed on the sole ground that the additional documents were not considered. He would also state that when Ex.A.1 contains the signature of nine attestors, according to him if really the defendant has intended to sell the property and he was in dire need money, he would have got entire money from the plaintiff and not chosen to wait for three years by stipulating the same as under Ex.A.1. He would further submit that three persons who have signed as witnesses in Ex.A.1 have deposed in favour of the defendant as D.W.2 to D.W.4. He would further submit that the Trial Court has not properly appreciated Ex.B.11 to B.35 which are either the ledgers for various years 1985, 1986 and 1987 etc. wherein the amount of Rs.1,50,000/- received by the defendant from the plaintiff has been consistently entered as a loan apart from the various amounts of principle as well as interest paid from April 1986 till January 1987 for 10 months at the rate of Rs.4,166.75 towards the principle and Rs.2,400 towards interest paid by the defendant to the plaintiff and these entries in the ledgers have been made much before the filing of the suit which was filed on 10.03.1988 and therefore, there is no reason to disbelieve the said documents.

12. Per contra, Mr.T.V.Ramanujun, learned Senior Counsel appearing for the respondent / plaintiff would submit that the defendant himself has admitted that it was knowing the contents of Ex.A.1 only he has signed. He would submit that even earlier before the remand this Court has considered in detail about Ex.A.1, which is a registered agreement for sale and has found that the defendant/appellant has failed to prove that the plaintiff was a money lender and based on the finding given by the Trial Court on remand on appreciation of additional documents Ex.B.26 to B.31 clearly arriving at a conclusion that they are not sufficient to conclude that the plaintiff was a money lender there is no necessity to re-adjudicate the issue.

13. I have considered the submissions made by the learned Senior Counsel for the appellant as also the learned Senior Counsel for the respondent and perused the entire documents including the additional documents marked after remand.

14. At the out set the Division Bench in L.P.A.No.56 of 1997 dated 11.07.2001, even though has remanded the matter to this Court for the purpose of referring to the Trial Court for marking additional documents by giving opportunity to both the parties, it remains the fact that earlier judgement passed by this Court in this Appeal dated 07.02.1997 was set aside and directed this Court to dispose of the appeal after receiving the finding from the Trial Court on remand. Now that the finding by the Trial Court has been received it is for this Court to independently consider the appeal on merits by considering the findings of the Trial Court on various issues and therefore, it is not correct as submitted by the learned Senior Counsel for the respondent that even after receiving the findings of the additional documents, it is not possible for this Court to readjudicate on the issue.

15. In the light of the above said reason and on the basis of the dictum laid down about the extent of powers of the First Appellate Court as pointed out in the judgement of the English Court in *Steponey Borough Council Vs. Joffee and others* 1949(1) All English Reports 256 at Page No.258, stating that it is to interfere when the judgement of the Court below is wrong not merely when it is found that the said judgement was not right, I proceed to analyse. The wordings of the Court in the above judgement are:

"it is constantly said that the function of the court of appeal is to exercise its powers were it is satisfied that the judgement below is wrong not merely because it is not satisfied that the judgement was right"

16. In the judgement rendered in the *The Dollar Company, Madras Vs. Collector of Madras* reported in 1975(II) SCC 730 it was held by the Apex Court that it is not merely because wherein it is possible to reach a different conclusion but in cases where the judgement of the Court below is not with reason or arrived at by a wrong application of the principle

and ultimately finding that the decision is wrong the Appellate Court can interfere. The operative portion are as follows:

"4. At the outset, we must warn ourselves of the broad guideline that in an appeal from an award granting compensation this Court will not interfere unless there is something to show not merely that on the balance of evidence it is possible to reach a different conclusion but that the judgement cannot be supported by reason of a wrong application of principle or because some important point affecting valuation has been overlooked or misapplied. Moreover, there is a prudent condition to which the appellate power, generally speaking, is subject. A court of appeal interferes not when the judgment under attack is not right but only when it is shown to be wrong. These twin principles serve as backdrop to our approach to the rival contentions in the case."

17. In yet another judgement as referred to by Mr.S.V.Jayaraman, rendered in S.V.R.Mudaliar (dead) by LRs. and others Vs. Rajabu F.Buhari (Mrs) (dead) By LRs. and others reported in 1995(4) SCC 15, the Supreme Court has held that the Appellate Court while considering the reasoning given by the court below must come close quarters with the judgement when it refuse and reverses the finding, in the following words:

"15. There is no need to pursue the legal principle, as we have no doubt in our mind that before reversing a finding of fact, the appellate court has to bear in mind the reasons ascribed by the trial court. This view of ours finds support from what was stated by the Privy Council in Rani Hemanta Kumari Debi Vs. Maharaja Jagadindra Nath Roy Bahadur wherein, while regarding the appellate judgement of the High Court of judicature at Fort William as "careful and able", it was stated that it did not "come to close quarters with the judgement which it reviews, and indeed never discusses or even alludes to the reasoning of the Subordinate Judge".

18. The Code of Civil Procedure also contemplates that a decree of the Court below can be reversed or modified for any error or irregularity only if it affects the merits and jurisdiction as it is seen under Section 99 which runs as follows:

"99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.- No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder (or non-joinder) of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court:

Provided that nothing in this section shall apply to non-

joinder of a necessary party."

19. Therefore, it is clear that when the finding of fact has been arrived at by the court below with reasons and appreciation of evidence which are not wrong and not affecting the merit of the case, to that extent the finding of the court below is final and the power of review by the Appellate Court is restricted. But if it decides to review or reverse it has to come to close quarters with the judgement which it seeks to review. It is on the basis of the said legal background and on going through the judgement of the Trial Court the following points arise for determination in this appeal

- 1) Whether the defendant is entitled to disprove the contents of the written registered agreement of sale Ex.A.1 to say that it was not intended as an agreement of sale but only a loan transaction and whether such contention by oral evidence is barred by Section 91 and 92 of the Indian Evidence Act.
- 2) Whether the defendant has proved that Ex.A.1 is really a loan transaction
- 3) Whether the judgement of the Trial Court is correct and there are no grounds to interfere.

20. As far as the first point about the Section 92 of the Indian Evidence Act, the Trial Court in the judgement impugned has held that Ex.A.1 is not only a registered agreement of sale but the defendant as D.W.1 has admittedly the execution of Ex.A.1 knowing the contents. Further the Trial Court has referred to a release deed dated 19.02.1986 under which the defendant's sister Palaniammal has executed a registered deed of release in favour of the defendant based on a compromise entered in E.P.No.3 of 1984 in O.S.No.530 of 1980 on the file of Sub Court Erode based on which the defendant and his sister Palaniammal have jointly obtained a deed of sale from the said Court on 24.04.1985 marked as Ex.A.6 and both the documents have been handed over by the defendant to the plaintiff at the time of execution of Ex.A.1 and held that Ex.A.1 was not executed by the defendant as a security towards the loan transaction. It is on that basis the Trial Court has relied upon Section 92 of the Indian Evidence Act, and rejected the contention of the defendant on the basis that, when Ex.A.1 is a written and registered document no oral evidence contrary to that can be adduced to show that the terms of the contract between the parties was entered with a different intention. It is in this context relevant to point out Section 92 of the Indian Evidence Act:

"92. Exclusion of evidence of oral agreement- When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:"

21. In the written statement filed by the defendant, the defendant has clearly stated that he never executed the suit agreement intending it to be an agreement of sale and after advancing a total loan amount of Rs.1,50,000/- in two installments out of which the second installment was on 28.02.1986 the interest for the said amount per hundred per month at the rate of 1.60 paise was arrived at Rs.2,400/- and the repayment of the said amount of Rs.1,50,000/- in 36 monthly installments at 36 percent per annum, the repayment was arrived at Rs.4,166.75 per month towards principle and total towards principle and interest an amount of Rs.6,566.75 towards the repayment of the said amount Rs.1,50,000/-. It was only on that basis three years time for repayment was mentioned in Ex.A.1. By narrating all the said facts the defendant has specifically stated in paragraph 7 of the written statement that it was only a loan transaction, as follows:

"7. The defendant, therefore, submits that there is only the relationship of creditor and debtor between the parties, and the suit transaction is only a loan. The defendant has thus so far paid a total sum of Rs.65,677.50 to the plaintiff. Even today he is making hectic attempts that the suit property was worth about 5 lakhs as on January 1986. Hence it could not be imagined that the defendant came forward to sell the suit property for a sum of Rs.2 Lakhs. The defendant humbly submits that taking into consideration of the Debt Relief Act, the financiers generally go for taking agreements of sale, empty pronotes etc., from the debtors. It is in consonance with the existing circumstances that the plaintiff took the impugned sale agreement from the defendant to enforce the repayment of debt as stipulated. The agreement of sale cannot be treated as one contracting to sell, and as such can not be enforced under law."

22. Therefore, even assuming that the defendant has admitted in evidence that only by knowing the contents of Ex.A.1 he has signed, it has been the defendant's contention in the pleading that the intention was not for the purpose of execution agreement for sale of the suit property but only for repayment of loan amount in a period of three years at 36 installments and it was with that idea the original document Ex.A.5 and A.6 were handed over by the defendant to the plaintiff. Therefore, it is clear that for the purpose of establishing his defense of loan transaction the defendant is not placing reliance on Ex.A.1 and his categorical case in the pleading is that Ex.A.1 is invalid. Inasmuch as the defendant is not placing reliance on Ex.A.1 he cannot be prevented from disproving the contents. That was the decision by the Supreme Court in Smt.Gangabai Vs. Smt.Chhabubai reported in 1982(1) SCC 4 as pointed out by this Court earlier when the appeal was disposed by relying upon the following paragraph:

"The bar imposed by Section 92(1) applies only when a party seeks to reply upon the document embodying the terms of the transaction and not when the case of a party is that the transaction recorded in the document was never intended:

"to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in that document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement, altogether not recorded in the document was entered into between the parties."

23. Therefore, it is clear that there is no bar on the part of the defendant while disproving the document Ex.A.1 under Section 92 of the Indian Evidence Act. The question that is to be decided is as to whether, while taking such steps to disprove the contents of Ex.A.1 as that of loan transaction instead of the agreement of sale has contained in the said Ex.A.1 to what extent he has succeeded and that is the crux of the issue involved in this case.

24. A reference to the written statement filed by the defendant shows that the plaintiff is the moneylender and when he requested the plaintiff in January 1986 to take a loan of Rs.1,50,000/- initially he has paid Rs.50,000/- on a promissory note and thereafter on 28.02.1986 another amount of Rs.1,00,000/- was paid in discharge of the promissory note totally constituting a loan amount of Rs.1,50,000/-. However, while giving evidence the defendant as D.W.1 has deposed that 10 days before the execution of Ex.A.10 he has purchased his sister's share in the suit property on 19.02.1986 and in that regard when he approached the brokers for a loan of Rs.1,50,000/- broker Ganesan and Kandasamy have told him that the plaintiff will lend money and it was based on that the plaintiff has paid Rs.40,000/- on 19.02.1986 based on which he has obtained the same from his sister on 28.02.1986 at the same time he has received Rs.1,10,000/- from the plaintiff and it was also decided that interest at the rate of Rs.1.60 shall be paid at Rs.100 per month and the total amount shall be repaid in 36 monthly installments at the rate of Rs.4,166.75 towards principle and Rs.2,400 towards interest.

25. To substantiate his contention the defendant has examined three witnesses, namely, D.2, D.3 and D.4 who have admittedly signed as witnesses under Ex.A.1. All the said three witnesses have also consistently spoken that the said amount of Rs.1,50,000/- was paid by the plaintiff to the defendant in two installments, namely, Rs.40,000/- paid first and then balance amount of Rs.1,10,000/- subsequently and that was only a loan transaction, agreed to be returned in 36 monthly installments. Even though the learned Trial Judge has rejected the evidence of D.W.2 to D.W.4 as not reliable witnesses, the reasons given by the learned Trial

Judge for not accepting their evidence are not based on the real fact, which will be evidenced by referring to the deposition of the said witnesses. In respect of the veracity of the evidence of D.W.2 the Trial Court has not chosen to rely upon his evidence on the basis that it was the defendant's stand that the said D.W.2 is related to the defendant.

26. On the other hand, it remains the fact that it is not in the evidence of D.W.2 that he is related to the defendant. Likewise in respect of the next witness examined on the side of the defendant as D.W.3 who was also a witness in Ex.A.1 the Trial Court has simply omitted the evidence on the ground that it is the plaintiff's case that D.W.3 is a close friend and he wanted to give his daughter in marriage. On the other hand, a reference to the evidence D.W.2 shows that even though it is admitted that he knows the defendant, there is nothing else, which can be taken from his evidence against the defendant. On the other hand, in respect of the borrowal of loan amount he has also categorically deposed. Likewise, in respect of the evidence of D.W.4, the Trial Court has rejected his evidence. But a reference to the evidence of D.W.4 also shows that what was received by the defendant from the plaintiff was by way of loan in two installments, namely, Rs.40,000/- in the first installment and Rs.1,10,000/- in the second installments. Therefore, it is clear that the Trial Court has not taken the evidence of the witnesses examined on the side of the defendant who are not merely witnesses who have spoken to substantiate the case of the defendant that what was received by him from the plaintiff was by way of a loan transaction but they also admittedly stood as witnesses under Ex.A.1 which was the basis on which the plaintiff has filed his suit.

27. The Trial Court has taken the inconsistency from the written statement wherein he has stated that in the first instance he has received Rs.50,000/- and in the second instance Rs.1,00,000/- from the plaintiff while in the evidence all the four witnesses have stated that it was Rs.40,000/- and Rs.1,10,000/- and therefore, there is a contradiction. It is also relevant to point out at this juncture that when the plaintiff has given notice on 08.10.1987 marked as Ex.A.2. The defendant in his reply notice dated 15.10.1987 marked Ex.A.4. At the earliest point of time he has stated that the receipt of amount of Rs.1,50,000/- was towards borrowal and not with an intention to sell his property. In the said notice the defendant has stated as follows:

"My client therefore state that he never executed any agreement of sale as such, and the impugned document if proved to be an agreement of sale could be only a transaction to secure due payment of instalment by my client. The impugned agreement being a contract interovom it is void under law and could not be enforced."

28. When that was the categoric stand except producing Ex.A.1 and examining himself as P.W.1, the plaintiff has not taken any steps to prove

that there was an agreement to sell. Merely relying upon the possession of original document Ex.A.5 and A.6 which is in fact admitted by D.W.1 himself that he has handed over to the plaintiff as a security for the repayment of loan, is itself not sufficient to prove the contents of Ex.A.1 as an agreement of sale especially when the same has been consistently denied by the defendant. In respect of Ex.B.3 to B.10 which are the Xerox copies of the receipts stated to have been signed by the plaintiff for receiving installments, it has been the case of the defendant even at the earliest point of time when a reply notice was given under Ex.A.4 dated 15.10.1987 that the originals of those receipts have been taken away by the plaintiff in a cunning manner and failed to return the same and it was in those circumstances the Xerox copies came to be filed. It was also the contents in the written statement in paragraph 6 as follows:

"6. During the month of March 1986, when the defendant was already in arrears for two instalments, requested the plaintiff further time for payment, he cunningly got back the receipt book stating that he would consult his lawyer and return the same while making further payment."

29. A reference to the signatures found in Ex.B.3 to B.10 certainly shows the resemblance of the signature of the plaintiff, as available in the affidavit filed in these appeals, even though the plaintiff as P.W.1 would simply deny having signed such receipts marked as Ex.B.3 to B.10. In such circumstances the learned Trial Judge by considering that the defendant has not chosen to state in the written statement that he was having the Xerox copies of the receipts with him, and rejected those documents on basis that the Xerox copy cannot be taken into consideration. It is also held that it is not proved by the defendant that the original of those Ex.B.3 to B.10 are available with the plaintiff. When the defendant in order to substantiate the said payments stated to have been made by him to the plaintiff, has produced the extract of his account books marked as Ex.B.11 to B.24, the Trial Court has rejected the same on the basis that the contents therein have not been proved, to have been maintained in usual course which is a clear finding of fact with proper reasons. It is in these circumstances, the additional evidence produced by the parties after the remand by the Division Bench, are relevant to be considered to find out as to whether the defendant has successfully proved his defense that the suit transaction was only a money transaction. The additional documents marked as Ex.B.26 to B.29 of course, as found by the Trial Court on remand has not shown any support to the contention of the defendant. If at all there are some relevancy it relates to Ex.B.30 and B.31 both of which are Xerox copies and the originals have not been summoned from the person who is admittedly having possession.

30. A reference to Ex.A.30 which was sought to be substantiated by the evidence of one of the parties to the said documents, namely, Kuruvammal examined as an additional witness on the side of the defendant

as D.W.5 after remand, shows that Kuruvammal and the plaintiff in the suit have entered an agreement like that of Ex.A.1 for sale of her property. That was on 20.07.1984 in which having received Rs.10,000/- there was a sale agreement entered under which D.W.5 Kuruvamal has agreed to sell her property in favour of the plaintiff. Ex.B.31 which is also a Xerox copy receipt which contains the signature of the plaintiff shows that inasmuch as D.W.5 Kuruvammal has returned back the amount of Rs.10,000/- the said receipt has been given in full quit of the entire amount as per the agreement of sale. Even though the said Ex.B.30 and B.31 show some support in favour of the defendant regarding his contention that Ex.A.1 was not an agreement but it was only a loan transaction, unfortunately, D.W.5 is not able to produce the original or taken steps to procure the same and in view of the same as correctly found by the Trial Court by way of report after remand, I am not able to be convinced that the additional evidence is in support of the defendant.

31. In view of the above said facts, even though this Court is able to find out that due to the above said clouds which I have narrated above, the judgement of the Trial Court is not correct but the same cannot be branded as a wrong judgement without any reason. As found out by the Trial Court even in respect of Ex.B.3 to B.10 nothing prevented the defendant who has chosen to state in the written statement that the originals of the said receipts were taken away by the plaintiff, from giving notice to the plaintiff to produce the originals, which has not been done. As far as Ex.B.11 to B.25 are concerned since different amounts have been credited in the account of plaintiff at different point of time, which does not correspond to the claim of the defendant, one cannot safely come to the conclusion that the said documents are sufficient to throw out the genuineness of Ex.A.1 especially in the circumstance that the Trial Court has considered each and every one of the document filed on the side of the defendant and given reason for the purpose of rejecting the same which I do not think can be termed as either perverse or unreasonable.

32. Now turning to the next contention raised by Mr.S.V.Jayaraman, the learned Senior Counsel appearing for the appellant that in an agreement for sale giving of three years time for performance is unusual, I am of the considered view that there is no bar for the parties to fix such a long time. As it is seen on the facts and circumstances of this case that in spite of the fact that three years time was given, the plaintiff has chosen to give a legal notice on 08.10.1987 itself and that cannot be a safe ground to come to the conclusion again to declare that Ex.A.1 document is invalid, for, as correctly found by the Trial Court the defendant has not taken any steps to prove that Ex.A.1 document as not intended to be executed as a sale transaction and there are no credible evidence on the side of the defendant to come to a safe conclusion that Ex.A.1 is only a money transaction, especially in the circumstance that it is not only writing but is a registered document which is certainly more creditable than any other document.

33. In view of the above said facts and circumstances of the case stated above, the evaluation of reasoning given by the Trial Court is not unreasonable and there is no reason to interfere with the judgement of the Trial Court. In the result the appeal is dismissed and considering the facts and circumstances there will be no order as to cost.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

nbj

To

1. The Additional Sub Court, Erode.

2. The Record Keeper, VR Section, High Court, Madras.

+ 1 CC To Mr. V.Pichiya, Advocate SR NO.28593

+ 1 CC To Mr. V.G.Suresh Kumar, Advocate SR NO.29393

Appeal Suit No.195 of 1993

ssk[co]
Gp/15.5.

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